JUL 23 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 207.

DAVID CHARLES KLEIN, trustee in Bankruptcy of WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Petitioner,

AGAINST

BRANDT & BRANDT PRINTERS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1955

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Petitioner,

AGAINST

BRANDT & BRANDT PRINTERS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Does a court of bankruptcy have the power to charge the assets of a non-bankrupt partnership, which assets it has no power to administer, with the compensation of the receiver, the trustee, and their attorneys of the estate of an individual bankrupt member of said partnership?

The above question represents the issue presented to the Court below on the last appeal and was the subject of its decision reported in 232 F. 2d 151 (Appx. p. 20).

The petition for writ of certiorari is directed to two separate decrees of the Court of Appeals. The first was dated

and entered on February 14, 1955 and the petition for rehearing was denied on May 11, 1955. No review on writ of certiorari was sought therefrom within the time prescribed by 28 U. S. C. A. Sec. 2101 (c). The issues determined by the Court of Appeals on this first appeal was the subject of its opinion in 220 F. 2d 935 (Pet. App. 13). The Court there held that the lower court's finding of the existence of a partnership between the bankrupt and the respondent was correct, but that since the partnership had not been adjudged a bankrupt and the respondent had not consented to the administration in bankruptcy of the partnership property, the partnership assets must be turned over to the respondent for administration under the New York Partnership Law. The remand was solely for the purpose of re-examination by the bankruptcy court of the claims filed in the bankruptcy proceedings so that an order might be entered subordinating those claims solely against the partnership to the claims against the individual partner (Pet. App. 18).

The Court below thus finally and conclusively disposed of all the issues between the parties leaving nothing more than an act extraneous to the issues involved.

The decree ascertained and declared the rights embracing the substantial merits of the controversy and the issues litigated or necessarily involved in the litigation.

Summary of Argument

The equitable powers of a Court of Bankruptcy do not authorize the allowance of compensation not expressly provided for in the Bankruptcy Act.

The Order of the Court below on the first appeal relative to the lack of jurisdiction of the Bankruptcy Act to administer the partnership property, assuming arguendo

the same is properly before this Court, is in accord with the decisions of other Courts of Appeals.

The decisions of the Court below are not in conflict with those of other Courts of Appeals, present no important question of Federal Law, and are not of public interest and importance.

POINT I

A bankruptcy court lacks power to grant compensation not expressly provided for by the Bankruptcy Act.

A bankruptcy court has only such jurisdiction as is conferred upon it by the statute. *New Lamp Chimney Co.* v. *Ansonia B. C. Co.*, 91 U. S. 656, 23 L. Ed. 336. *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. *Matter of Hollins*, 2 Cir., 229 Fed. 349, cert. den. 241 U. S. 661, 36 S. Ct. 448, 60 L. Ed. 1226. *Silberberg* v. *Ray Chain Stores, Inc.*, 3 Cir., 58 F. 2d 766, cert. den. *Winne* v. *Silberberg*, 287 U. S. 631, 53 S. Ct. 83, 77 L. Ed. 547. *Wheeling Structural Steel Co.* v. *Moss*, 4 Cir., 62 F. 2d 37; *Naylor* v. *Canley*, 8 Cir., 96 F. 2d 761; *Moore* v. *Scott*, 9 Cir., 55 F. 2d 863. Although jurisdiction in bankruptcy is conferred on the district court, the latter when sitting as a Court of Bankruptcy is regarded as a separate court exercising powers and a jurisdiction distinct from its powers as a district court. *Hanna* v. *Brietson Mfg. Co.*, 8 Cir., 61 F. 2d 139. *Norris' Case* (D. C. Mich.) 18 Fed. Cas. 317, Fed. Cas. No. 10304.

It is unquestioned that bankruptcy courts have equity powers, but it is settled that the equitable powers may be exercised only within the limits of the Bankruptcy Act and subject to and consistent with the specific provisions contained therein. *Securities & Exchange Commission* v.

United States Realty & Improvement Co., 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293, *Young* v. *Higbee Co.*, 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890; *Matter of Columbia Ribbon Co.*, 3 Cir. 117 F. 2d 999, *Wheeling Valley Coal Corp* v. *Mead*, 4 Cir. 171 F. 2d 916; *Burton Coal Co.* v. *Franklin Coal Co.*, 8 Cir., 67 F. 2d 796. In *Matter of Judith Gap Commercial Co.*, 9 Cir., 5 F. 2d 307, 309, the Court held that though bankruptcy proceedings are equitable in their nature "nevertheless they are to be administered in accord with the Bankruptcy Act and general orders, and not by virtue of any broad unlimited equity power".

Compensation for services rendered is but one of many phases of bankruptcy proceedings expressly governed by the Act.

Trustees and receivers in bankruptcy, as well as referees, are public officers and their fees and allowances are allowable only within the limits of the Bankruptcy Act. They "must show clear warrant of law before compensation will be owing to them in the performance of their public duties". *Realty Associates Securities Corp.* v. *O'Connor*, 295 U. S. 295, 55 S. Ct. 663, 666, 79 L. Ed. 1446; *Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464, 468, 57 S. Ct. 519, 80 L. Ed. 804; *Matter of Prindible*, 3 Cir., 115 F. 2d, 21. The Courts of Appeal have uniformly held that the bankruptcy court lacks power to grant, and the policy of the Act is against compensation not expressly provided for by the Act. *Lane* v. *Haytian Corp.*, 2 Cir., 117 F. 2d 216, cert. den. 313 U. S. 589, 76 S. Ct. 1101, 85 L. Ed. 1537; *Guerin* v. *Weil, Gotschal & Manges*, 2 Cir. 205 F. 2d 302, *Berry* v. *Root*, 5 Cir., 148 F. 2d 945, cert. den. 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453. *In re First Bond & Mortgage Co.*, 5 Cir., 74 F. 2d 930, *Matter of Joslyn*, 7 Cir., 224 F. 2d 223, *Levin* v. *Barker*, 8 Cir., 122 F. 2d 969. In *Berry* v. *Root* (*supra*), 148 F. 2d 945, 946,

the Court after noting that a bankruptcy court often applies equitable principles but "is not strictly a Court of Equity, but a statutory Court created by the Bankruptcy Act, and governed by it", stated:

> "As to that proceeding the Act of 1898 has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees. The original Act and all the amendments and expansions have dealt specifically with the costs and attorney's and other fees to be allowed, and have dealt jealously with them. The fees allowable for services in each kind of bankruptcy proceedings have been provided, expressly or by implication, others are excluded."

The compensation of receivers and trustees is fixed under Sec. 48 (11 U. S. C., Sec. 76) and Sec. 62 (11 U. S. C., Sec. 102) of the Act, and is payable, together with their attorneys' fees, under Sec. 64 (11 U. S. C., Sec. 104) of the Act. *Matter of India Wharf Brewery Inc.*, 2 Cir., 96 F. 2d 710; *In re Lustron Corp.*, 7 Cir., 196 F. 2d 975. *In re McKenna* (D. C., N. Y.), 137 Fed. 611.

Petitioner made no attempt in the court below and cannot here indicate any provision of the Act which authorizes the payment of the compensation sought.

The following cases cited by the petitioner were not bankruptcy proceedings and therefore inapplicable: *New York Dock Co.* v. *S. S. Poznam*, 274 U. S. 117, a proceeding in admiralty to establish a lien on a vessel; *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, an action by a stockholder against a corporation for mismanagement; *Palmer* v. *Texas*, 212 U. S. 118, an action by a stockholder to liquidate a corporation; *Trustees* v. *Greenough*, 105 U. S. 527, a bondholder's action against trustees to preserve

a fund for bondholders as a class; *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, a bank depositor's action to establish her right in a trust fund which permitted other depositors to recover from the fund on the law made in the case.

Warren v. *Palmer*, 310 U. S. 132, and *In re Peer Manor Bldg. Corp.*, 7 Cir., 143 F. 2d 764, cert. den. 323 U. S. 757, cited by petitioner, are in accord with the bankruptcy decisions above noted. In each of these bankruptcy proceedings there was express statutory authority for the compensation allowed. *Warren* v. *Palmer* (*supra*) was a proceeding under former Sec. 77B of the Act (11 U. S. C. A. Sec. 207). The authority for the granting of allowances was Sec. 77 B(c) (9), (11 U. S. C. A. Sec. 207 (c) (9)) which authorized the judge to "allow a reasonable compensation for services rendered" and Sec. 77 B (1) (11 U. S. C. A. Sec. 207 (1)) which authorized the judge to include in an order of dismissal of the proceedings "such terms as the judge may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section, and for the payment of administration expenses and allowances in the proceeding hereunder." The *Peer Manor* case (*supra*) was a proceeding involved under Chapter X of the Bankruptcy Act (U. S. C. Title II, Chap. 10, Sec. 501-676). Sec. 242 (2) (3) (11 U. S. C. Sec. 642(2) (3)) empowered the judge to allow reasonable compensation to parties in interest and their attorneys. Sec. 246 (11 U. S. C. Sec. 646) empowered the judge to allow reasonable compensation "to any persons entitled thereto, as provided in this chapter", upon dismissal of the proceedings or the entry of an order adjudging the debtor a bankrupt.

The policy of the Act to restrict compensation to that specifically authorized is further evidenced by General Orders in Bankruptcy 35 (3) which provides that "The

compensation allowed to receivers or trustees by the Act shall be in full compensation for the services performed by them", and by Section 72 (11 U. S. C. Sec. 112) of the Act which provides that no receiver or trustee "shall in any form or guise receive, nor shall the Court allow him, any other or further compensation for his services as required by this Act than that expressly authorized and permitted in this Act." In *McMillen* v. *U. S. Fidelity & Guaranty Co.*, 8 Cir., 22 F. 2d 155, the Court held that Sec. 72 prohibits any equitable consideration of reasonable compensation on a *quantum meruit* basis, and in *Nisonoff* v. *Irving Trust Co.*, 2 Cir., 68 F. 2d 32, 34, the Court stated that "The terms of the Act are explicit and strictly enforced."

Sec. 64 of The Act (11 U. S. C. Sec. 104) *supra*, expressly made inapplicable to proceedings under Sec. 77 B (*Warren* v. *Palmer*, *supra*) by Sec. 77 B (c) (8) (k) (11 U. S. C. A. Sec. 207 (c) (8) (k)) and to proceedings under Chapter X (*re Peer Manor Bldg. Corp.* (*supra*) by Sec. 102 (11 U. S. C. Sec. 502)), directs the distribution of the moneys belonging to the bankrupt estate. It provides for the order of payment "out of bankrupt estates", and for the payment therefrom of compensation of receivers, trustees and their attorneys. The bankrupt estate consists only of the residue left after the determination of questions of title, liens and other claims asserted by their parties. *City of Richmond* v. *Bird*, 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543. *In re Cramond* (D. C. N. Y.), 145 Fed. 966; *In re Tresslar* (D. C., Ala.), 20 F. 2d 663; *City of Dallas* v. *Ryan*, 5 Cir., 62 F. 2d 959 cert. den. 289 U. S. 342, 53 S. Ct. 602, 77 L. Ed. 1489. Under this section it is the estate of the bankrupt which is liable for the compensation of the receivers and trustees and their attorneys.

The words "estate" and "bankrupt estates" in the Act mean the unencumbered assets generally of a bankrupt

properly administrable in bankruptcy. The Act does not deal with property which forms no part of the bankrupt's assets. *Matter of Quaker City Uniform Company Inc.* (D. C., Pa.) 134 F. Supp. 596. A "bankrupt" is one against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt (Sec. 1 (4)) (11 U. S. C., Sec. 1 (4) of Act). In the instant matter the bankrupt is Friedman and not the partnership.

The partnership assets did not constitute an asset of the individual's bankrupt estate. Two separate entities are involved herein, the partnership, and Friedman, as the individual bankrupt. Each has its own assets and liabilities. In New York, it has been held that in keeping partnership accounts, the partnership is treated as a legal entity, separate and distinct from the several partners. *Jones* v. *Blun*, 145 N. Y. 333, 341; *U. S.* v. *Onassis* (S. D., N. Y.), 133 F. Supp. 327, 331 (footnote 4).

Upon the finding of the Court below that a partnership existed, the partnership property herein was held by the bankrupt only as a trustee. *Meinhard* v. *Salmon*, 249 N. Y. 458; *Hart* v. *Ronan*, 58 N. D. 516, 226 N. W. 620; 14 A. B. R. (N. S.) 431. Property held by a bankrupt in trust does not constitute an asset or part of a bankrupt's estate. *In re Finkelstein*, 2 Cir., 33 F. 2d 278; *In re Heintzelman Const. Co. Inc.* (D. C., N. Y.), 34 F. Supp. 109; *In re Kline* (D. C., Pa.), 7 F. Supp. 850, affd. sub. nom; *United States National Bank* v. *Blauner's Affiliated Stores*, 3 Cir., 75 F. 2d 826.

The fact of possession of partnership property by the receiver-trustee is of no significance. In *Marnet Oil & Gas Co.* v. *Staley* (*supra*), 218 Fed. 45, 49, the Court stated:

> "The jurisdiction of the court as a court of bankruptcy was not enlarged by the act of the bankrupt

in surrendering to the trustee in bankruptcy partnership property, theretofore in the bankrupt's charge as managing partner, which, without the consent of his solvent partner, the plaintiff in this suit, was not subject to be administered in the bankruptcy proceeding."

Under Section 52 of the New York Partnership Law "a partner's interest in the partnership is his share of the profits and surplus", which can be determined only after compliance with Section 71 of said Law (App. P. 16). The only interest that the receiver-trustee of Friedman had in the partnership property was the right to demand and receive Friedman's interest as a partner, if any, in the firm assets after an accounting and payment of partnership debts out of partnership assets. See also *Redman* v. *Witt*, 6 Cir., 9 F. 2d 36; *In re Mercur*, 3 Cir., 122 Fed. 384; *Pearson* v. *Higgins*, *supra*, 49 F. 2d 47; Section 5 (i) Bankruptcy Act (11 U. S. C., Sec. 23 (1)). Factually, this interest does not exist. In his petition annexed to the proposed order to show cause herein submitted to the Referee, the petitioner stated: "As the partnership funds are insufficient to pay partnership debts, there will be no necessity to account to the Trustee for the interest of the bankrupt partner."

The following have been held not to constitute assets of a bankrupt's estate:—property subject to a conditional sales agreement (*Matter of Lake's Laundry, Inc.*, 2 Cir., 79 F. 2d 326, cert. den. 296 U. S. 622, 56 S. Ct. 144, 80 L. Ed. 442); property held by a bankrupt as bailee or agent (*In re Wright-Dana Hardware Co.*, 2 Cir., 211 Fed. 908; *Taylor* v. *Fram*, 2 Cir., 252 Fed. 465); property in possession of a bankrupt on consignment (*Liebowitz* v. *Voiello*, 2 Cir., 107 F. 2d 914); pledged property in the hands of the bankrupt pledgee (*In re Jacob Berry & Co.* (D. C., N. Y.), 146 Fed. 623, aff'd 174 Fed. 409); property which

came into possession of the bankrupt through fraud (*Gillespie* v. *J. C. Piles Co.*, 8 Cir., 178 Fed. 886), and property of a third party pledged as collateral for the payment of a bankrupt's obligations. *In re A. Roth Co. Inc.*, 7 Cir., 118 F. 2d 156; idem. 125 F. 2d 396.

Property which does not constitute a part of the bankrupt's estate must be withdrawn from the bankruptcy proceedings free from the conditions that may be imposed upon general or secured creditors, *American Service Co.* v. *Henderson*, 4 Cir., 120 F. 2d 525, and free from administration expenses to meet which estate assets may not suffice. *Todd* v. *Pettit*, 5 Cir., 108 F. 2d 139.

Where property is taken from an owner thereof without his consent by a receiver under an order reversed on on appeal, the claimant is entitled to a return of the property without charge of any kind against either him or the property. *Beach* v. *Macon Grocery Co.*, 5 Cir., 125 Fed. 513. Commissions are allowable only upon the surplus remaining after the sale in bankruptcy of personal property pledged for the repayment of a loan. *In re Meadows*, 2 Cir., 211 Fed. 948, cert. den. sub. nom. *Hotchkiss* v. *Lynn*, 234 U. S. 763, 34 S. Ct. 997, 58 L. Ed. 1581. Upon the bankruptcy of a stockholder, the commissions of the trustee are calculated on funds which do not include either securities or their proceeds which claimants have successfully reclaimed, nor can any allowance to the attorney for the trustee be made out of such securities or their proceeds. *In re Wilson* (D. C., N. Y.), 252 F. 631; *In re Morris Bros.* (D. C., Ore.), 8 F. 2d 629. *In re Toole and Henry* (D. C., N. Y), 294 Fed. 975. No commissions are payable upon property sold by a receiver but found not to constitute property of the bankrupt estate on the ground that the property of the bankrupt estate on the ground that the property fraudulently came into the possession of the bankrupt. *Gillespie* v. *J. C. Piles & Co.* (*supra*), 178 Fed. 886.

Where mortgaged property is retained for administration for the benefit of general creditors, compensation is payable out of the general estate. *In re Meyers*, 2 Cir., 24 F. 2d 349; *Gugel* v. *New Orleans Bank*, 5 Cir., 239 Fed. 676; *Smith* v. *Township*, 6 Cir., 150 Fed. 257; *In re Chakos*, 7 Cir., 24 F. 2d 482; *In re 4136 Wilcox Bldg. Corp.*, 7 Cir., 109 F. 2d 588. *In re Williams Estate*, 9 Cir., 156 Fed. 934, 939, the Court stated:

> "They are not chargeable with the general costs of the administration of the bankrupt's estate such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney."

In re T. E. Hill Co., 7 Cir., 159 Fed. 73, cited by petitioner, is not in conflict with the decision below. It involved a dismissal of a bankruptcy proceeding. The Seventh Circuit is in accord with other circuits to the effect that non-bankrupt estate property is not chargeable with expenses of compensation for estate services. *In re Chakos* (*supra*), 24 F. 2d 482, *In re 4136 Wilcox Bldg. Corp.* (*supra*), 109 F. 2d 588; *In re A. Roth Co. Inc.*, 118 F. 2d 156; idem. 125 F. 2d 396. *In re Joslyn* (*supra*) 224 F. 2d 223.

The absence of funds in the bankrupt estate to pay the commissions and allowances does not warrant the Court to order payment thereof from property not constituting property of the estate. *In re Fords Warbuck Springs, Inc.* (D. C., Mass.) 7 F. 2d 959; *Todd* v. *Pettit* (*supra*), 108 F. 2d 139; *Gugel* v. *New Orleans Bank* (*supra*), 239 Fed. 676; *In re Harralson* (8 Cir.), 179 Fed. 490; *Smith* v. *Township* (*supra*), 150 Fed. 257; *In re Richardson* (D. C., La.), 44 F. 2d 671. In *Burton Coal* v. *Franklin Coal Co.* (*supra*), 67 F. 2d 796, 797, the court, after noting that the jurisdiction of a bankruptcy court in equity is confined

to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act, stated:

> "The plain mandate of the law cannot be set aside because of considerations, which may appeal to referee or judge as falling within general principles of equity jurisprudence."

One of the contentions of the petitioner is that a bankruptcy court is a court of equity and that under general principles of equity the partnership assets constituted a fund which was equitably chargeable with a lien for the expenses which have created and preserved it, including compensation to counsel. This contention is untenable both under equitable doctrines and under the Bankruptcy Act.

As above discussed, compensation of a receiver-trustee and counsel is strictly governed by the Act and is payable only from the estate of the bankrupt.

Further, the petitioner did not create and preserve the partnership assets. Such assets were always those of the partnership, the existence of which was found by the Court. The receiver-trustee could not act for partnership creditors. He represented only the estate of the individual bankrupt and his individual creditors. There was no finding of expressed or implied consent by the partnership creditors to their representation by petitioner. *Lea v. Paterson Sav. Inst.*, 5 Cir., 142 F. 2d 932. The receiver was appointed under Section 2a (3) of the Bankruptcy Act (11 U. S. C., Sec. 11a (3)) which authorizes the appointment of a receiver "to take charge of the property of bankrupts". In his action to fasten a partner's liability upon respondent, the receiver acted outside the scope of his duties. *In re Marcuse*, 7 Cir., 11 F. 2d 513. The Trustee, vested "with the title of the bankrupt" under Section 70a (11 U. S. C., Sec. 110a, *supra*), was elected under Section

44 of the Act (11 U. S. C. Sec. 75) by "the creditors of the bankrupt", and the first duty of trustees, under Sec. 47 of the Act (11 U. S. C. A. Sec. 75) is to collect and reduce to money "the property of the estates for which they are trustees". It is "all the items of real and personal property belonging to the bankrupt estate" which is the subject of appraisal and sale. Section 70f (Sec. 11 U. S. C., Sec. 110f). The operation of the business of the bankrupt herein by the receiver-trustee was not done by the procurement or with the consent of the partnership. It was presumably in the interests of the general creditors of Friedman, as the individual bankrupt herein.

Apart from the restrictions on the power of the bankrupt court as above discussed, and viewed from the point of equitable doctrines, it is respectfully submitted that the compensation sought is without authority.

The allowance in equity of the expenses of litigation termed costs "as between solicitor and client" are allowable only in exceptional cases and for dominating reasons of justice. It has been held that the discretion to allow same should never be exercised in a case where the interests of the party whose fund is to be charged are antagonistic to the party for whose benefit the suit is prosecuted. *Caine* v. *Payne* (C. C. A., D. C., Col.), 191 F. 2d 482. In *Gillespie* v. *J. C. Piles & Co. (supra)*, 8 Cir., 178 Fed. 886, 892, the Court stated:

> "There is a manifest injustice and inequity in taking out of a fund or property in the custody of a court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its

> custody and pay compensation for the services of an attorney of a trustee or for the services of any other party by means of which the fund or property has been taken or detained from its equitable owner. Hobbs v. McLean, 117 U. S. 567, 581, 6 Sup. Ct. 870, 29 L. Ed. 940."

In equity there can be no compensation allowed on assets not constituting part of the property being administered by the court. *Attorney General* v. *North American Life Ins. Co.*, 89 N. Y. 94, 105; *Cornell* v. *Nichols, Longworthy Co.*, 2 Cir., 201 Fed. 320. Thus, if property of which the receiver takes possession is determined to belong to persons not parties to the action, the receiver is not entitled to reimburse himself from the fund or property in his possession. High, Receivers (4th Ed.) Section 796, *Ephraim* v. *Pacific Bank*, 129 Cal. 589, 592, 62 Pac. 177, *Howe Co.* v. *Jones*, 66 Iowa 156, 23 N. W. 376, *Pittsfield National Bank* v. *Bayne*, 140 N. Y. 321, 329, 330. The general rule in equity, as in bankruptcy as above discussed, is that neither a mortgagee nor the mortgaged property is liable for receivership expenses not sought or acquiesced in by the mortgagee. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 370; *Nicholsen* v. *Western Loan & Bldg. Co.*, 9 Cir., 60 F. 2d 516, cert. den. 288 U. S. 605, 53 S. Ct. 396, 77 L. Ed. 980. In *Seaboard Nat. Bank* v. *Rogers Mill Products Co.*, 2 Cir., 21 F. 2d 414, it was held improper to charge expenses of administration, principally fees for equity receivers and their attorneys, to the fund realized from the sale of mortgaged property.

It is respectfully submitted that it is uniformly held that a court of bankruptcy has no power to direct that compensation be paid to its officers and their attorneys from property not constituting an asset of a bankrupt estate being administered by it.

POINT II

The order of the Court below relative to lack of jurisdiction over partnership property assuming the same is properly before this Court is in accord with established principles of law.

The Court below held that the bankruptcy court had no jurisdiction to administer the partnership property over the objection of the respondent herein.

The involuntary petition in bankruptcy herein was directed solely to "William Friedman doing business under the name and style of Faultless Press, bankrupt". It alleged that said Friedman, while engaged in business, and insolvent, committed acts of bankruptcy. The respondent was not named in said petition. There was no allegation of a partnership, open or secret, and no allegations of the insolvency of a partnership or of any secret or dormant partner. The subpoena issued thereon and the subsequent order of adjudication was addressed solely to said Friedman.

Under Section 5 of the Bankruptcy Act (11 U. S. C. 23), an adjudication of a partner does not result in the adjudication of the partnership. The partnership and its individual partners are separate and distinct entities from one another. A partnership may be adjudged bankrupt, irrespective as to whether its members as individuals are adjudged bankrupt, and any member may be adjudged bankrupt without involving the partnership entity. *In re Ginsberg*, 3 Cir., 219 F. 2d 472; *Lurie* v. *U. S.*, 6 Cir., 20 F. 2d 589. A partnership must petition or be petitioned against an entity, and if the adjudication in bankruptcy follows, the partnership as such is the entity adjudicated. An adjudication of the partnership as an entity, apart

from or in addition to the adjudication of its partners, is indispensable to the jurisdiction and power of the Bankruptcy Court to administer the partnership property *In re Henry L. Meyer*, 2 Cir., 98 Fed. 976; *In re Mercur, supra*, 122 Fed. 384; *In re L. Stein & Co.*, 7 Cir., 127 Fed. 547.

The only manner in which the Bankruptcy Court could acquire jurisdiction over the assets in an involuntary proceedings in bankruptcy is set forth in Section 3, 5 and 59 of the Act (11 U. S. C. Secs. 21, 23, 95).

Qualified creditors of the partnership, alleging acts of bankruptcy, may file an involuntary petition against the partnership or as against the partnership and its individual members. The partnership, or any general partner thereof, could appear and plead to the petition. Bankruptcy Act, Section 18B (11 U. S. C. Sec. 41 B). The allegations of partnership, insolvency, amounts of claims of creditors, and the commission of the alleged acts of bankruptcy may be controverted. Sec. 18 of the Act (11 U. S. C. A. Sec. 41).

In *Liberty National Bank* v. *Bear*, 278 U. S. 215, cited by petitioner herein, this Court rejected the contention that the adjudication of a partnership was in effect an adjudication of the individual members as contrary to the express provisions of Sec. 5 of the Bankruptcy Act, and held that a petition filed against a partnership which did not in terms seek an adjudication that the individual partners were bankrupts as individuals, nor allege that the individuals were insolvent or had committed any acts of bankruptcy, was not in legal effect a petition filed against them individually, and the adjudication of the partnership was not in legal effect an adjudication of the individual partners.

In defending, the partnership or general partner may defeat the involuntary petition upon a showing of solvency.

A partnership is not insolvent unless the total of its assets and the total of the assets of all of its individual members together, are insufficient to pay its debts. *Francis* v. *McNeal*, 228 U. S. 695, 33 S. Ct. 701, 57 L. ed. 1029; *In re Fuller*, 2 Cir., 9 F. 2d 557; *Mason* v. *Mitchell*, 9 Cir., 135 F. 2d 599.

In the instant matter, the effect of the order of the Referee was to subject alleged partnership assets and an alleged secret partner's assets to the jurisdiction of the Court, although there had been no adjudication in bankruptcy of the partnership or of the alleged secret partner. Such practice was not warranted by any provision of the Act.

In *Matter of Kaufman*, 2 Cir., 176 Fed. 93, 94, an involuntary petition in bankruptcy was filed against one Isaac Kaufman. A motion was thereafter made to amend the proceedings to correspond to the facts so that the petition and adjudication should run not only against Isaac Kaufman, individually, but "Isaac Kaufman" a partnership of which the members were Isaac Kaufman and one Lena Kaufman, his wife. Lena Kaufman appeared generally and filed an answer to the motion. The District Judge held that "it is established that they were as a matter of fact partners doing business under the name of Isaac Kaufman" and ordered the title of the proceedings amended to recite the partnership, and Lena Kaufman to turn over all partnership property to the trustee. The Circuit Court in reversing the order stated:

> "Counsel for Lena Kaufman contends that the record does not sustain the finding that she was a partner with her husband, but it is not necessary to go into that branch of the case. For the purposes of this appeal it may be assumed that for some time prior to the filing of the petition in bankruptcy there

was a firm in the district doing business under the name of 'Isaac Kaufman,' the partners in which were Isaac Kaufman and Lena Kaufman. The existence of the firm, however, was not known or even suspected and in consequence the proceeding was instituted not against any partnership but against Isaac Kaufman individually. The difficulty with the order is that, after proceedings against the individual has progressed for a considerable time, much testimony having been taken, it undertakes to establish the pendency pari passi of another proceeding against the firm, which was never begun by filing any petition against it, and to put that second proceeding in the same condition as the first. In our opinion this cannot be done by a mere order; such a procedure would deprive the firm and the partner now sought to be brought in of the opportunity which the statute gives them to controvert the facts alleged in the petition and to have, if they so desire, a trial by jury on the question of insolvency and any act of bankruptcy alleged to have been committed."

In *Matter of E. M. Fuller & Company* (*supra*) 9 F. (2) 557, the Court stated:

"Indeed, we very clearly indicated, though we did not decide, in Re Samuels, 215 F. 845, 132 C. C. A. 187, that a new adjudication of bankruptcy was necessary, when there was a dormant partner. Any other view must treat the original petition as alleging not only that the estates of named partners and the firm assets were insufficient, but that the same was true if one added the estates of whatever unknown and dormant partners might chance to be discovered. That would be plainly an absurdity, and

no such evidence would have been admissible on the trial of such a petition."

See also *Matter of Kramer and Muchnick* (D. C., Pa.) 213 Fed. 138; *In re J. & M. Schwartz* (D. C. N. Y.) 204 Fed. 326; *Carter* v. *Whisler*, 8 Cir., 275 Fed. 743.

The petitioner cites *Kaufman-Brown Potato Co.* v. *Long*, 9 Cir., 182 F. 2d 594. There an involuntary petition in bankruptcy was filed against two partners individually and two partnerships of which they were partners. The individual partners and the two partnerships were adjudicated bankrupts. The Trustee moved for an order adjudging that there was a third partnership comprised of the two individual bankrupts and other persons. An order was entered adjudging the third partnership a bankrupt but the other persons were not individually adjudicated bankrupts. The Court held that the question was whether the lower Court had the power to decree the third persons members of a partnership which had not been theretofore mentioned in the proceedings and to adjudge such partnership a bankrupt. In holding that the order "was beyond the legal power of the Court" (below), the Court held that there was no authorization to be found in the Bankruptcy Act for an involuntary adjudication as a bankrupt except upon the petition of qualified creditors, and that since the acts of bankruptcy charged in the involuntary petition involved insolvency, proof of the partnership insolvency was mandatory. This holding is in accord with that of the Court below in the instant matter.

The petitioner also cites *In re Harris*, 108 Fed. 517. There the Referee held that since there was an adjudication of bankruptcy of the ostensible partner, the partnership in reality was adjudicated bankrupt under the name of the ostensible partner, such latter name appearing to be the firm name under which the secret partnership did

business. The referee therein stated: "There appears to my mind some doubt as to the soundness of this view". The Court below noted that "*In re Harris*, D. C. N. D. Ohio, 108 F. 517, is perhaps distinguishable on its facts; if not we think it is wrong" (Pet. App. 17 footnote 4). Petitioner does not cite any decision of another Court of Appeals on the same matter in conflict with the decision of the Court below.

Under Sec. 5 (1) of the Act (11 U. S. C. Sec. 23), where all of the general partners of a partnership are not adjudged bankrupt, "the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."

It is settled that while the Bankruptcy Court has jurisdiction over the interests of the bankrupt partners in the partnership property, the non-bankrupt partner has the right to administer the partnership property elsewhere than in the bankruptcy.

Marnet Oil & Gas Co. v. *Staley*, 5 Cir., 218 Fed. 45; *Benitez* v. *Bank of Nova Scotia*, 1 Cir., 110 F. (2) 169; *In re Henry L. Meyer*, *supra*, 98 Fed. 976; *In re Mercur*, *supra*, 122 Fed. 384; *Redman* v. *Witt*, *supra*, 9 F. (2d) 36; *Pearson* v. *Higgins*, *supra*, 49 F. (2d) 47.

The petitioner does not now question the applicability of the cases cited above but contends that there was a consent. In its answer respondent challenged the jurisdiction of the Court to administer the property, and when consent was given by it to a sale of the property, such consent was "without prejudice to our claim that the court has no jurisdiction over the property" with the Referee's

comment that "the understanding is whatever rights you have are being preserved."

Petitioner contends that only a partner who acknowledges his status as such at the inception of the proceedings is protected under Section 5 of the Act. No authority is cited for such contention and the Act does not so provide. Petitioner further contends that by denying its status as a partner and in claiming property as owner it, by its adverse claims, gave its consent, and that the Act was not intended to and does not apply to one resisting the contention that he is a partner. No authority is cited to sustain such position. In *Francis* v. *McNeal* (*supra*), 228 U. S. 695, cited by petitioner, the involuntary petition in bankruptcy and subsequent adjudication were against all the partners and the firm. In *In re Harris* (*supra*), the Referee found consent from the action of the silent partner in "standing by without protest, and even with positive denials of any interest in the fund". In the instant case, the respondent asserted its rights and adverse interest to the property in question without delay.

In *Kaufman-Brown Potato Co.* v. *Long* (*supra*), 182 F. 2d 594, 602 (footnote), the Referee noted the existence of consent. There two grounds were advanced as the basis of consent; the first, as a result of a denial of existence of a partnership, and the second, in joining in the involuntary petition, voting for trustee, and in failing to assert an adverse claim. The Court held that the first was not a consent, but that consent could be inferred from the second. None of the elements of the second ground are present here. In the case at bar the petition of the petitioner is silent as to an allegation of consent or facts from which consent could be inferred. Consent is neither noted in the Referee's decision, nor in the order entered thereon.

Petitioner also contends that since the respondent did not object to the administration of all of the firm property,

and turned over a bank balance in the account of Faultless Press to the Receiver, its consent may be inferred. The bank balance was turned over to the Receiver in March, 1954 (Rec. p. 81) several months before the present motion was instituted. Until the petition below was filed by the Receiver, no attempt was made to administer all of the assets as partnership property, and it cannot be said that respondent consented to such administration when it was unaware of any claim of partnership at the time the bank account was turned over. As noted by the Court below "This turn over, however, occurred several months before the Trustee in the bankruptcy proceedings sought to hold Brandt as a partner" (Pet. App. 16 Footnote 2). As stated by the Court below "nor has appellant overtly or impliedly consented to the administration in bankruptcy of the partnership property" (App. 16).

Kaufman-Brown Potato Co. v. *Long* (*supra*) cites *Tate* v. *Brinser* (D. C. Pa.), 226 Fed. 878. The opinion in the *Tate* case is appropriate herein. The Court in referring to the status of one Brinser who was not adjudicated a bankrupt stated (pp. 883-884):

> "There was no attempt then being made to bring the partnership assets in to such court, and how could it be said that Brinser assented to such when it was not attempted? The referee's decision upon the right of Brinser to vote the claims for the election of a Trustee, and the review of that decision by the court upon the petition of Brinser, in no manner involved the partnership assets. Whether they should be brought in by the solvent partner was neither before the referee nor the court. * * * When these claims were proven and attempted to be voted, Brinser was not confronted with any such action. There was no such action. The moment he was confronted with the action he promptly chal-

lenged the jurisdiction and has persisted in that challenge ever since."

The decision of the Court below relative to the lack of jurisdiction of the Bankruptcy Court over the partnership property was in accord with established principles of law and the decisions of other Courts of Appeal. If the decision is in conflict with the Harris decision (*supra*), decided by a District Judge in another circuit, then, it is respectfully submitted, such conflict is outside the rule which moves this Court to grant a writ on the ground of a conflict of decisions (Rule 19).

POINT III

No special or important reasons exist for certiorari.

The decisions of the Court of Appeals are not in conflict with the decisions of this Court or of the other Courts of Appeals. There are no important questions of federal law presented. The questions presented are not of public interest and general importance. The decisions of the Court below are of limited application due to unusual facts presented.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for writ of certiorari, and the petition should be denied.

Respectfully submitted,

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